

APPENDIX A**NOTICE**

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the deposit of the same.

Nos. 80-1954, 81-98 (Consolidated)

PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

—vs—

EDDIE HARRIS a/k/a
EDWARD SHIEF-EL and
GERALD BURKS,

Defendants-Appellants.

Appeal from the
Circuit Court of
Cook County

—
Honorable
Francis J. Mahon,
Presiding.

**ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23**

The defendants Gerald Burks and Edward Shief-El, also known as Eddie Harris, were convicted of murdering Venson Bass. Burks received a 50 year sentence under the extended term provision and Harris received an 80 year sentence. The trial was held before a jury and each defendant was separately represented by counsel. Both defendants raise extensive arguments concerning the prosecutor's misconduct. In addition, Burks claims that he was denied the effective assistance of counsel, the right to present evidence and due process. He also argues that the court erred in permitting an extended term sentence. Harris contends that he was not proved guilty beyond a reasonable doubt.

Venson Bass' body was found in Lake Michigan on April 21, 1978. An autopsy revealed the cause of death to be multiple gun shot wounds in the head and neck. The wound to the forehead showed both an entrance and exit wound that might have caused the death by itself.

The State presented two eyewitnesses. Herman Shannon, Jr., testified that on March 16, 1978, he was with Gerald Burks at Burks' house. Burks said that someone had broken into his house and that he suspected Bass and Sharon Weekly. Weekly denied that she had been at Burks' house and gave Burks the number of the person where she was. Burks called. That person denied that Weekly had been there. Burks continued to question Weekly. Eddie Harris came over and agreed to assist Burks in tricking Bass out of the place where he was hiding. Burks pointed a pistol at Bass at which point Bass made a motion with his hands inside his coat. Burks then fired, hitting Bass in the head. Burks and Harris put Bass in the back seat of Harris' car. Harris took Bass' gun and shot Bass in the neck. When they arrived at the lake Harris pulled Bass from the car and Burks, Harris and Shannon threw Bass into the lake. Shannon was going back to the car when he heard three or four shots and saw Harris shooting into the water. Harris said that he did not tell this story until after he was granted immunity from prosecution for his participation in the murder.

Harry Trapp, the other eyewitness, testified that he had known Harris for about four or five months and had dealt in narcotics with Burks for about four months. He was in the car when he saw Harris and Burks come out of a building supporting Bass who was slumped over and bleeding. Burks and Shannon talked to Bass in the car. Trapp heard Bass say he did not take any money. Harris got into

the back seat of the car and hit Bass with a pistol and then shot him in the neck. While the others took Bass and dumped him in the lake he heard Harris say Bass was trying to swim and he heard four or five more shots.

Harris, in arguing that he was not proved guilty beyond a reasonable doubt, notes the less than sterling character of the two witnesses for the State. Shannon had been a convicted thief and was serving time at the time of trial. He was a narcotics user at the time of the murder. Trapp had a current armed robbery prosecution pending. Harris also contends that Trapp's testimony is improbable because he stated that he heard Bass talk to Burks and Shannon in the back seat of the car after Bass had been shot in the head. The coroner had testified that the bullet wound in the head showed both entrance and exit wounds and could have been fatal in and of itself. We do not find the evidence so unsatisfactory to leave a reasonable doubt as to the defendant's guilt. The weight and credibility to be afforded the testimony of Shannon and Trapp was a matter for the determination of the jury. The record indicates that the jury was made aware of the prior convictions and involvement with drugs of these witnesses. Moreover, the jury instructions specifically addressed the issues of credibility of witnesses with prior convictions, the testimony of accomplices, and testimony given by drug addicts. Despite these factors, the jury after weighing their credibility, chose to believe the testimony of the State's witnesses.

Both parties argue extensively concerning the conduct of the prosecutor. They contend that the prosecutor improperly argued that they were narcotics dealers, implied that they had committed crimes other than that for which they were on trial, and suggested that the jury should

convict them on the basis of those unproven allegations. In support of this contention they point to the opening statement where the prosecutor referred to Shannon and Trapp as business associates of the defendants and the business as narcotics. In direct examination Shannon stated that they were more or less business associates. Shannon said he purchased narcotics from Burks and delivered pills to Harris. Shannon's testimony established that Burks told him that he suspected Bass of stealing narcotics and money from him. Burks, as well as Harris, argues that this evidence was immaterial and irrelevant. The State responds that it was relevant because narcotics was the motive for the killing. We think this response is appropriate. Although evidence of other crimes is generally inadmissible, evidence which establishes *motive*, intent, identity, accident or absence of mistake is admissible even though it may involve proof of a separate offense. (*People v. Manzella* (1973), 56 Ill. 2d 187, 306 N.E. 2d 16.) Here, the State was permitted to present evidence bearing upon the motive for the murder.

Harris and Burks contend that the prosecutor improperly commented upon their failure to testify. The prosecutor did this during rebuttal argument when he said that the defendants did not have to present any evidence but that they waived that right and presented a case that took them "exactly one minute and 38 seconds." Harris and Burks argue that the question is whether the comment was intended or calculated to focus the attention of the jury on the failure of the defendants to testify, citing *People v. Mills* (1968), 40 Ill. 2d 4, 237 N.E. 2d 697. The State notes that immediately before that statement was made the prosecutor said that the jury heard the State present evidence for two and one-half days. The State

concludes that the prosecutor was commenting on the uncontradicted nature of the State's case. We believe that the comment can fairly be construed that way, and it is not error to argue that the State's case is uncontradicted. *People v. Ganter* (1977), 56 Ill. App. 3d 316, 371 N.E. 2d 1072.

Along these same lines Burks argues that the prosecutor commented that of all the witnesses who were present at the shooting, the jury really only heard from Shannon. Burks contends that this is a comment on the defendants' failure to testify. The State contends that this was an invited comment because the defendants initiated the discussion as to the caliber of weapons when they commented on the testimony of the State's witnesses. The comment in question was made as a reply to the defendants' argument. We do not believe that this reference called attention to the defendants' failure to testify.

Burks contends that the prosecutor accused defense counsel of hiding a prosecution witness and called into question the motive and integrity of defense counsel. Harris makes a similar argument. This argument stems from comments made in opening and closing arguments by the State's Attorney. At opening argument he stated that Sharon Weekly did not respond to the subpoena but her mother told the police that she did not know where her daughter was but that if they had any further questions they could talk to her lawyer, Chester Slaughter. Chester Slaughter represented Gerald Burks in the proceedings. In closing argument the prosecutor commented that the State was not allowed to bring out the facts that it stated in the opening statement. The court sustained an objection to that statement. The defendants construe this as an attempt by the State to accuse defense counsel of the crime of ob-

structing justice. They also contend that this was an impermissible attack on the motives and integrity of defense counsel. Along the same lines they refer to statements by the prosecutor which referred to the defendants' attorneys as "two professional defense attorneys" and suggested that defense counsel were attempting to "create confusion" in arguing "little puffs of smoke" and that the role of the attorneys was to try to "make a fool" out of the jury. Cited as authority for reversal are the cases of: *People v. Hovanec* (1976), 40 Ill. App. 3d 15, 351 N.E. 2d 402; *People v. Manroe* (1977), 66 Ill. 2d 317, 362 N.E. 2d 295; *People v. Weller* (1970), 123 Ill. App. 2d 421, 258 N.E. 2d 806; *People v. Mwathery* (1968), 103 Ill. App. 2d 114, 243 N.E. 2d 429; *People v. Stock* (1974), 56 Ill. 2d 461, 309 N.E. 2d 19; and *People v. Weathers* (1975), 62 Ill. 2d 114, 338 N.E. 2d 880.

These cases rise and fall on their own facts and the particular statements involved vary considerably. What can be gained from these cases is a rough sense as to what constitutes reversible error and what does not. We believe that while some of these statements are not appropriate, the characterization that they portray defense counsel as obstructing justice is indeed tenuous. We conclude that these statements do not warrant the sanction of a reversal.

Both defendants argue that the prosecutor improperly placed the integrity of the State's Attorney's office behind a prosecution witness. They cite a statement where the prosecutor explained how immunity is given and that the State's Attorney determines whether or not immunity should be granted to a witness. They both cite the case of *People v. Valdery* (1978), 65 Ill. App. 3d 375, 381 N.E. 2d 1217. The State contends that this statement was made

in response to comments by defense counsel which commented on the immunity given to the State's witnesses. Counsel stated that the State would tell the jury that the State did not give them immunity but rather immunity from a judge. There was an objection to the statement which was sustained. If there was any error it was minimal and it was cured.

Both defendants contend that the prosecutor made impermissible comments suggesting that the jury should convict without regard to the standard of proof beyond a reasonable doubt. In closing argument the prosecutor summed up the State's evidence and then made the following comment: "If somebody came up to you and told you that this is what happened, you would say oh, my God, I think he has got something to do with it." The prosecutor then said that "there are cases * * * tried every day in this very building with no more evidence than that." There was an objection made and sustained by the court. We again believe that any error was cured.

The defendants argue that even if none of the matters individually warrant a reversal, their cumulative effect was to deny them a fair trial. We do not agree. There was evidence from two eyewitnesses that the jury had an opportunity to evaluate. Counsel most competently brought out every negative aspect of those witnesses. We do not believe that these comments, if improper, denied either defendant a fair trial.

Burks contends that the prosecutor argued to the jury that defense counsel's objections prevented the State from introducing crucial incriminatory evidence. The prosecutor commented that "* * * the State only was allowed to elicit certain things about some transactions and pills between the people. Well, even that evidence that we were allowed

to produce, you saw them jumping up and down like jumping jacks, objecting, screaming, running back there —." An objection was overruled. Further, counsel commented that they were allowed to bring out certain things and that the court found other things not relevant. He then stated, "Now they will hide behind those rulings and say they didn't bring those things out, and that is an effort to recreate a false issue, to put out another puff of smoke." An objection was sustained. Burks is correct that these comments were improper. The question before the court is whether or not they warrant reversal. Considering all the evidence we do not believe so.

Burks argues that he was denied the effective assistance of counsel because defense counsel never attempted to interview any of the alibi witnesses. Defense counsel testified that he was familiar with the people that the defendant had mentioned as alibi witnesses. He had represented most of the people in criminal matters. He considered the background of some of the defendant's witnesses and compared them with the background of the State's witnesses. The State suggests that defense counsel made a strategic decision not to present any witnesses at all and instead to focus his defense on the credibility of the State's two occurrence witnesses and their possible motives to lie. The State contends, and we agree, that mistakes in trial strategy will not render the representation incompetent. Counsel was in fact a former Assistant State's Attorney with considerable experience and also had considerable experience as a defense attorney in private practice. The representation of the defendant certainly was not of such low caliber as to amount to no representation at all. *People v. Murphy* (1978), 72 Ill. 2d 421, 381 N.E. 2d 677.

Burks contends that he was denied his sixth amendment constitutional right to present evidence because the State granted *de jure* immunity to one occurrence witness but only provided *defacto* immunity to a second. By refusing *de jure* immunity to the second witness, it prevented that second witness from recanting prior testimony. The defendant admits that no case has considered this issue and the only support he has for his argument is the case of *Government of Virgin Islands v. Smith* (3d Cir. 1980), 615 F. 2d 964 in which the court said that where there is a deliberate intention to distort the fact finding process, vindictive prosecutorial selectivity violates due process. In that case the juvenile authorities, which properly had jurisdiction over the witnesses, was willing to grant him immunity subject to the consent of the United States Attorney. The court found that the United States Attorney had no justification for refusing to consent and deliberately intended to keep highly relevant exculpatory evidence from the jury. We do not find this type of deliberate intention to distort the fact finding process in the instant case. The right to grant immunity is a power awarded to the State by the legislature. (*People v. Frascella* (1980), 81 Ill. App. 3d 794, 401 N.E. 2d 1045.) The courts have no power to grant immunity in order to secure testimony which the defense deems relevant. Also, although Burks contends that the witness' recantation testimony would have been sufficient grounds for a new trial, such testimony is generally considered very unreliable as a basis for granting a new trial. See *People v. Frascella*.

Burks claims that he was denied due process when the prosecutor misled the jury concerning benefits that would accrue to Trapp in exchange for his testimony. On this issue the defense strategy was that the State's witnesses,

both Trapp and Shannon, testified to lies for their own benefit. Defense counsel during closing arguments stated that "irrespective of what the State's Attorney will tell you, Shannon and Trapp will not be sent back to the penitentiary system." In response during rebuttal argument the State's Attorney made the comment that Trapp is going to the penitentiary. During post trial motions one of the prosecutors who argued the case testified that he knew that Trapp was to be given some consideration. Burks argues that in the instant case Trapp was not prosecuted and he was not returned to the penitentiary. In another matter pending against Trapp the charges were dismissed. Although the record is not entirely clear on the subject, we do believe that the prosecutor was in error in making the statement. However, considering the extensive cross-examination on the subject and the fact that Trapp admitted that he had become a State's witness in an armed robbery case in hope of receiving some consideration, Trapp's character was fairly before the jury and this one comment does not warrant a new trial.

Burks argues that exculpatory evidence in the form of credible alibi testimony presented at post trial motions requires a new trial. The argument here centers around the fact that the indictment stated that the offense was committed on April 21, 1978. It was later amended to allege that it occurred on a date between March 16 and April 21, 1978. During trial the State's witnesses specifically stated the date as being late in the evening on March 16 and in the early morning hours of March 17. The failure to provide the defendant with a more accurate date was either due to the State's negligence or a deliberate act in withholding the date. This lack of a specific date prevented the defendant from properly presenting an alibi

defense. The State responds that the defendant himself testified at the post trial hearing that the names of the potential alibi witnesses had been given to his defense counsel four to six months prior to going to trial. The propriety of using those witnesses was discussed earlier. The essence of Burks' claim is that the State was responsible for the defense's failure to present the alibi witnesses and the alibi evidence.. That conclusion is not supported by the evidence. This matter was considered by the trial court in a post trial motion. Evidence of this sort is subject to the closest scrutiny. The trial court's discretion in this matter is considerable and we do not believe that it was abused. *People v. Miller* (1980), 79 Ill. 2d 454, 404 N.E. 2d 199.

Burks' final argument is that the court was in error in applying the extended term statute because it is unconstitutional. It is alleged to be unconstitutional because it does not contain appropriate standards. This issue was waived because it was not presented to the trial court at the time of sentencing and was not included in the amended motion for a new trial.

The judgments of the circuit court of Cook County are affirmed.

Dated at Chicago, Illinois, this 25th day of March, 1982.

ENTER:

.....,
Justice.

.....,
Justice.

GLENN T. JOHNSON,
Justice.